IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARAINE CANNON,	**:**	**CIVIL ACTION**
	:	
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
THE VANGUARD GROUP, Inc.,	**:**	
	:	
Defendants.	**:**	**NO. 96-5495**

M E M O R A N D U M

Reed, J. **August 18, 1998**

Pending before the Court is the motion of plaintiff Laraine Cannon for reconsideration of this Court's Order of June 11, 1998 (Document 55), and the response of defendant The Vanguard Group, Inc. thereto. For the following reasons, I will deny the motion.

I. BACKGROUND

Plaintiff brought this lawsuit seeking to recover long term benefits allegedly owed her under a policy of group insurance provided by her employer The Vanguard Group. The facts giving rise to this litigation were articulated in my previous memorandum opinion dated June 11, 1998 (Document No. 52) cited at Cannon v. The Vanguard Group, Civ. No. 96-5495, 1998 WL 310663 (E.D. Pa. June 11, 1998). Plaintiff filed a complaint in state court which defendant removed to this Court. In denying a motion to remand, this Court ruled that the complaint alleges a claim pursuant to a group disability plan of plaintiff's employer, which is thus an employee benefit plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132 ("ERISA"), and thus removal was proper. (Order dated 10/3/96, Document No.

10). After plaintiff filed an Amended Complaint, whereby plaintiff substituted her employer for the Plan Administrator, CNA Insurance Companies, as the named defendant, defendant filed an answer asserting, *inter alia*, that the contract claim and the bad faith claim pursuant to 43 Pa. C.S. § 8371 were preempted by ERISA. (See Answer at ¶ 11 and Ninth Affirmative Defense, Document No. 30).

In an Order issued on June 11, 1998, this Court granted the motion of defendant The Vanguard Group, Inc. for a protective order. (Document No. 51). Specifically pertinent to the current motion for reconsideration is the ruling in that Order that the claim of plaintiff for bad faith pursuant to the Pennsylvania statute was preempted by ERISA.[1]

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[1] My June 11, 1998 Order is restated in full here:

> **AND NOW**, on this 11th day of June, 1998, upon consideration of the motion of defendant The Vanguard Group, Inc. for protective order (Document No. 43), the response of plaintiff and all subsequent papers filed on the issue, and having found and concluded the following:
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> 1. Plaintiff's asserted purpose in seeking to depose defense counsel and the president of the defendant corporation is to gather evidence of possible improper motive or conduct on the part of defendant through its agents in support of plaintiff's putative Pennsylvania state law bad faith claim pursuant to 43 Pa. C.S. § 8371. (See Amended Complaint ¶ 11, Document No. 23); (See Pl. Resp. to Mot. for Protective Order at ¶¶ 10, 13, 14) (Document No. 44);
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> 2. This Court has determined that this lawsuit involves an employee benefit plan and, as such, is governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132 ("ERISA"). (Order dated 10/3/96, Document No. 10);
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> 3. The claim of plaintiff for bad faith on the part of defendant pursuant to Pennsylvania statute 43 Pa. C.S. § 8371 is preempted by ERISA, even though plaintiff characterizes her claim as a contract claim under Pennsylvania law. See Ferry v. Mutual Life Ins. Co. of N.Y., 868 F. Supp. 764, 770-72 (W.D. Pa. 1994); Rallis v. Trans World Music Corp., No. 93-6100, 1994 WL 96264, at *4 (E.D. Pa. Mar. 25, 1994);
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> 4. This Court hereby concludes that the discovery sought is beyond the scope of permissible discovery as defined in Federal Rule of Civil Procedure 26(b)(1) because the discovery sought here is privileged and not relevant to the subject matter involved in the pending action and further because the plaintiff in her Notice of Deposition directed to attorney Stern expressly seeks the correspondence of and the mental impressions of defendant's attorney, the defendant and the insurance carrier CNA Insurance Companies regarding the defense of the disability claim, the discovery of which is protected by the last sentence of the first paragraph of Federal Rule of Civil Procedure 26(b)(3); and

II. LEGAL STANDARD

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. Therefore, such motion must rely on at least one of three grounds: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or (3) the need to correct a clear error of law or to prevent manifest injustice. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986); Reich v. Compton, 834 F. Supp. 753, 755 (E.D. Pa. 1993), aff'd in part and rev'd in part on other grounds, 57 F.3d 270 (3d Cir. 1995).

III. ANALYSIS

A. ERISA Preemption

The threshold issue before the Court to be analyzed in this motion for reconsideration is whether the Pennsylvania bad faith statute, 43 Pa. C.S. § 8371, is preempted by ERISA where the plan at issue is not self-insured, but instead is a fully-insured plan.

Plaintiff apparently bases her reconsideration motion on the third prong outlined above.[2] Plaintiff argues that the Court erred by ruling that ERISA preempts the bad faith claim

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> 5. Based upon the foregoing analysis, the Court concludes that the defendant is entitled for good cause shown to be protected from the discovery requests herein and pursuant to Federal Rule of Civil Procedure 26(c)(1);
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> it is hereby **ORDERED** that the motion for protective order is **GRANTED** and the requested disclosure and discovery shall not be had.
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> **IT IS FURTHER ORDERED** that pursuant to its request for counsel fees defendant may no later than **July 16, 1998** file a motion seeking counsel fees pursuant to Federal Rule of Civil Procedure 37(a)(4), which filing should include such affidavits and other reliable proofs of the costs, expenses and counsel fees incurred by defendant in seeking the instant relief.

[2] I note that the arguments asserted by plaintiff in her motion of reconsideration were not made previously in her memoranda of law in response to defendant's motion for protective order (Document Nos. 44, 46). While an entirely new argument without intervening change in the law or new evidence would not meet any of the three criteria, I will consider the motion pursuant to the third criterion.

because, according to plaintiff, ERISA does not preempt such a claim where the insurance plan at issue is not a self-insured plan, but a fully-insured plan.[3] ERISA plans may be either self-insured (benefits are paid from contributions supplied by employers) or insured, also called fully-insured (plan purchases insurance from an outside insurance company to cover the benefits payable). See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 732 (1985).

Plaintiff is correct in her assertion that ERISA preempts state laws where the policy at issue is self-insured. See discussion infra. A closer look at the applicable analysis, however, reveals that preemption is still appropriate here, even where the policy is not self-insured.

ERISA contains three provisions relating to preemption: a preemption clause, a savings clause and a deemer clause.[4] The United States Supreme Court described the interaction

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[3] Plaintiff points to the following language of the plan:

> The [Short-Term Disability] portion is self insured by Vanguard and is administered by an external disability management company, CNA Insurance Company. The [Long-Term Disability] portion . . . *is fully insured* and is also administered by CNA Insurance Company.

(Pl. Mem., Ex. A, "Comprehensive Disability Management Program") (emphasis added). And, according to plaintiff, because the lawsuit is based on a long-term disability claim, and because that particular portion is not self-insured, ERISA will not preempt the bad faith claim. I need not determine whether the plan at issue is a self-insured or fully-insured. For purposes of analysis, I will assume that the plan is a fully-insured program.

[4] ERISA provides, in pertinent part:

> Except as provided in [the savings clause], the provisions [mentioned above] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. (preemption clause)
> . . .
> Except as provided in [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities. (savings clause)
> . . .
> Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law

of these three provisions as follows. "If a state law relate[s] to . . . employee benefit plan[s], it is pre-empted. . . . The savings clause excepts from the preemption clause laws that regulate insurance. . . . The deemer clause makes clear that a state law that purport[s] to regulate insurance cannot deem an employee benefit plan to be an insurance company." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (internal quotations and citations omitted). Thus, the savings clause returns to the states the power to enforce those state laws that regulate insurance, except as provided in the deemer clause. FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990). Under the deemer clause, self-funded ERISA plans are exempt from state laws that regulate insurance within the meaning of the savings clause. Id. at 61. The Supreme Court in FMC explained:

> State laws directed toward the plans are pre-empted because they relate to an employee benefit plan but are not "saved" because they do not regulate insurance. State laws that directly regulate insurance are "saved" but do not reach self-funded employee benefit plans because the plans may not be deemed to insurance companies . . . for purposes of such state laws. On the other hand, employee benefit plans that are insured are subject to indirect state insurance regulation. An insurance company that insures a plan remains an insurer for purposes of state laws "purporting to regulate insurance" after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation.

Id.; see also Travitz v. Northeast Dep't ILGWU Health and Welfare Fund, 13 F.3d 704, 710 (3d Cir. 1994), cert. denied, 511 U.S. 1143 (1994).

Thus, it must first be determined whether the state law relates to the employee benefit plan and is thus preempted. 29 U.S.C. § 1144(a). If the law relates to such a plan, the next inquiry is whether the state law is saved from preemption as determined by whether the state

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> of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies. (deemer clause)

29 U.S.C. § § 1144 (a)-(b).

law regulates insurance. 29 U.S.C. § 1144(b)(2)(A). Only if the analysis survives these two initial steps, does the consideration of the type of insurance plan at issue -- as self-insured or fully-insured -- become relevant. Only in that event, it must then be determined whether the plan in question is "deemed" to be an insurance company. If the plan is not deemed to be an insurance company and is thus a self-insured plan, the plan is exempted from the "savings clause" and ERISA preemption applies. 29 U.S.C. § 1144(b)(2)(B). Under these circumstances, claims grounded in state law cannot be pursued.

Numerous federal district courts within the Third Circuit have consistently held that Section 8371, while it relates to the employee benefit plan, it is not a state law regulating the insurance industry, and thus does not fall within the savings clause. These courts therefore concluded that Section 8371 is preempted by ERISA. See, e.g., Reilly v. Keystone Health Plan East, Inc., Civ. No. 98-1648, 1998 WL 422037, at *3 (E.D. Pa. July 27, 1998); Ferry v. Mutual Life Ins. Co. of N.Y., 868 F. Supp. 764, 772 (W.D. Pa. 1994); Ruth v. Unum Life Ins. Co. of Am., Civ. No. 94-3969, 1994 WL 481246, at *3-5 (E.D. Pa. Sept. 6, 1994); Rallis v. Trans World Music Corp., Civ. No. 93-6100, 1994 WL 96264, at *4 (E.D. Pa. Mar. 25, 1994); Gelzinis v. John Hancock Mut. Life Ins. Co., Civ. No. 93-0569, 1993 WL 131566, at *4 (E.D. Pa. Apr. 27, 1993); Northwestern Inst. of Psychiatry v. Travelers Ins. Co., Civ. No. 92-1520, 1992 WL 331521, at *2-4 (E.D. Pa. Nov. 3, 1992).

The Court of Appeals for the Third Circuit has not yet spoken on whether Section 8371 regulates insurance within the meaning of the savings clause of ERISA. Plaintiff has not presented any compelling argument to warrant a deviation from the overwhelming number of district courts in this Circuit which found that Section 8371 does not regulate insurance. I concur

with the analyses of these district courts and conclude that Section 8371 does not regulate insurance, and is thus not within the savings clause.

Plaintiff contends that Section 8371 is not preempted by ERISA because the plan here is fully-insured, not self-insured, and that all the cases cited by defendant deal exclusively with self-insured plans. But this argument ignores a necessary step of the ERISA preemption analysis. Only if Section 8371 falls within the savings clause, *i.e.*, that it is a law which regulates insurance, is the deemer clause relevant. Because I have concluded that Section 8371 does not fall within the savings clause, the deemer clause analysis is inapplicable. Thus, I find that the distinction between a fully-insured and self-insured plan is not material where the Section 8371 bad faith claim is not within the savings clause. See Swerhun v. Guardian Life Ins. Co. of Am., 979 F.2d 195, 199 n.6 (11th Cir. 1992) ("[B]ecause [plaintiff's] claims are not "saved" by the savings clause, the deemer clause is immaterial . . . ."), cited in Blue Cross and Blue Shield of Ala. v. Fondren, 966 F. Supp. 1093, 1095-96 (M.D. Ala. 1997); Health Cost Controls v. Zimmerman, No. 96-4276, 1996 WL 745145, at *2 (N.D. Ill. Dec. 26, 1996) (reasoning that "if the 'savings clause' applies, the court must determine if the plan in question is 'deemed' to be an insurance company under ERISA's 'deemer clause'").

B. Counsel Fees

Plaintiff also challenges the Court's June 11, 1998 Order to the extent that it subjects plaintiff's discovery requests to counsel fees. In that Order, I ruled that defendant may file a motion seeking counsel fees. See supra footnote 1. The docket reveals that defendant did not file a motion seeking counsel fees and I have made no such award. I therefore conclude that plaintiff's motion to reconsider the Court's Order regarding counsel fees is dismissed without

prejudice as moot.

IV. CONCLUSION

For the reasons articulated above, I conclude that there is no clear error of law or manifest injustice with my Order dated June 11, 1998.

An appropriate Order follows.

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Plaintiff,	**:**	
	:	
v.	**:**	
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THE VANGUARD GROUP, Inc.,	**:**	
	:	
Defendants.	**:**	**NO. 96-5495**

O R D E R

AND NOW, on this 18th day of August, 1998, upon consideration of the motion of plaintiff Laraine Cannon for reconsideration of this Court's Order dated June 11, 1998 (Document No. 55), and the response of defendant The Vanguard Group, Inc. thereto, and for the reasons articulated in the foregoing memorandum, it is hereby **ORDERED** that the motion for reconsideration is **DENIED**.

LOWELL A. REED, JR., J.